No. 77-649

In the Supreme Court of the United States

OCTOBER TERM, 1977

DEMOPOLIS CITY SCHOOL SYSTEM, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This school desegregation suit was commenced by private plaintiffs, and the United States then intervened as a plaintiff.[1] The suit challenged, among other things, racial discrimination in the City of Demopolis, a small city in which racial separation was enforced by law for 15 years after the decision in *Brown* v. *Board of Education*, 347 U.S. 483 (Pet. App. 59).

A three-judge district court entered an order on June 29, 1970, holding that the school system had been operated and maintained in violation of the Constitution. The

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[1]The present case is part of *Lee* v. *Macon County Board of Education*, M.D. Ala., C.A. No. 604-E, which was filed in 1963 to challenge racial discrimination in school districts throughout the State of Alabama.

order (Pet. App. 39-48) assigned all secondary students to one junior high and one senior school, thus effectively desegregating those grades. The court did not, however, adopt a similar remedy for the elementary schools; it instead attempted to disestablish the statutorily dual school system by geographic zoning (*id.* at 39-42).

The attempt failed. Eastside Elementary School, previously open only to black students, remained overwhelmingly black; Westside Elementary School, previously open only to white students, remained overwhelmingly white (Pet. App. 58).[2] The United States therefore sought supplemental relief to desegregate the elementary schools. Although petitioner "has repeatedly stated that only pairing will effectively desegregate these schools" (*ibid.*), the district court declined to order additional relief (*id.* at 49-56).

The court of appeals reversed (557 F. 2d 1053; Pet. App. 57-61). It held that the 1970 order had not effectively addressed the continuing effects of discrimination in the elementary schools and that the district court's judgment therefore must be modified to comply with the requirements of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1.[3] The court of appeals ordered the two elementary schools to be paired, so that neither would be racially identifiable.

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[2]From 1971 to 1976 Eastside had an enrollment between 95 and 100 percent black, and Westside had an enrollment between 87 and 91 percent white (Pet. App. 58).

[3]For other post-*Swann* orders see, *e.g.*, *United States* v. *Texas Education Agency* (*Richardson ISD*), 512 F. 2d 896 (C.A. 5), certiorari denied, 423 U.S. 837; *Hereford* v. *Huntsville Board of Education*, 504 F. 2d 857 (C.A. 5), certiorari denied, 421 U.S. 913. Post-*Swann* relief has been granted to modify other 1970 orders in the *Lee* case similar to the one entered against petitioner. See, *e.g.*, *Lee* v. *Macon County Board of Education (Anniston City)*, 483 F. 2d 244 (C.A. 5); *Lee* v. *Macon County Board of Education* (*Dothan City*), M.D. Ala., C.A. No. 1060-S, decided April 4, 1975.

The judgment of the court of appeals is correct, and it presents no novel issue requiring review by this Court. It is unquestioned that petitioner practiced racial discrimination; the two elementary schools were built and operated as one-race schools. They acquired a racial identity that cannot be overcome simply by establishing a policy of facially-neutral school assignments.[4] See *Swann*, *supra*; *Dayton Board of Education* v. *Brinkman*, No. 76-539, decided June 27, 1977.

The pairing remedy ordered by the court of appeals is directly related to redressing the conditions caused by petitioner's system-wide constitutional violation. See *Dayton Board of Education* v. *Brinkman*, No. 76-539, decided June 27, 1977. And undisputed evidence in the record supports the conclusion (Pet. App. 58-59) that pairing is feasible and not unduly burdensome. The two schools are only two and one-quarter miles apart by road, and they are not separated by any significant barriers (*id.* at 58).[5] In order to attend the racially-separate schools

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[4]Petitioner relies on a number of cases, including *Washington* v. *Davis*, 426 U.S. 229, that establish the criteria for determining when unconstitutional racial discrimination has taken place. But there is no similar question in the present case; petitioner's schools were segregated by law, and the separation was maintained by official action for more than a decade after *Brown*. Under these circumstances, the school district must eliminate "root and branch" all of the present consequences of its prior discrimination. *Green* v. *County School Board*, 391 U.S. 430, 438. There is no need for a plaintiff to prove that the school authorities intended the consequences to continue; it is enough that the discrimination was intentional and that its consequences persist.

[5]Petitioner contended in the court of appeals, for the first time, that there were physical barriers (see Pet. App. 63-72). But petitioner did not so argue in the district court, and its argument is unsupported by record evidence.

before 1970, both black and white elementary students routinely crossed from one side of the city to the other (Supp. R. 19-21)[6], a journey fully as arduous as that required under the pairing remedy. All students in the secondary grades now attend one school (Pet. App. 41) without apparent problem. All elementary school students could be accommodated by two school buses operating shuttle routes (III R. 27-28 (Hurtado deposition)),[7] and this transportation would eliminate any inconvenience or danger that elementary students might encounter in walking on or crossing public roads.

The court of appeals applied well-established principles to the particular facts of this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

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[6] "Supp. R." refers to the supplemental record in the court of appeals.

[7] "III R." refers to volume III of the record in the court of appeals.